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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

THE NEW YORK LIFE INSURANCE CO.,
Plaintiff in Error,

vs.

FANNY CRAVENS,
Defendant in Error.

No. 262.

Statement of the Case and Brief for Defendant in Error.

This is an action on a policy of life insurance issued by plaintiff in error, defendant below, on the life of John K. Cravens, who died Nov. 2nd, 1892. The beneficiary in the policy is Fanny Cravens, defendant in error, widow of the assured.

The purpose of the action is to recover extended or temporary insurance provided by Sections 5983 and 5985 of the Revised Statutes of Missouri, 1879.

This case was tried to the Court upon the pleadings and an agreed statement of facts, a jury being waived (Rec. 13). From the pleadings and the agreed statement, the following undisputed facts appear:

1. Plaintiff in error is a New York corporation and at all times mentioned was engaged in the business of life insurance in the State of Missouri by authority of her laws, and maintained offices, resident agents, and medical examiners in Missouri. (Rec. 14.)

2. On May 2nd, 1887, the local agents of plaintiff in error, solicited John K. Cravens, a resident of Missouri, at his residence in Missouri to insure his life in plaintiff in error's company. Thereupon and thereat Mr. Cravens signed and delivered to said local agents a written application for the policy in suit (Rec. 14, 15). This application was by its own terms and the terms of the policy made a part of the policy and contained the following provision (Rec. 25): "That under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premium by the company or its authorized agent during the life-time and good health of the person on whose life insurance is applied for."

This application was sent by said agent from Missouri to the home office of the company (plaintiff in error) in the City of New York. Thereupon and thereat plaintiff in error issued the policy in suit and transmitted same to Kansas City, Missouri, to its said agent who received same in Missouri and delivered same in Missouri to John K. Cravens and collected in Missouri at the time of said delivery the first premium called for by the policy. (Rec. 15.)

3. Four full annual premiums of $589.50 each were paid on said policy and each was paid annually as it fell due in Missouri to plaintiff in error (Rec. 15). The fifth and sixth annual premiums were due and unpaid at the time of the death of Mr. Cravens (Rec. 15).

4. On Nov. 2nd, 1892, Mr. Cravens died in Missouri and proof of death was made to plaintiff in error in due time and form. (Rec. 15.)

5. On May 11th, 1891, the date of lapse, the policy had acquired a net value of $1290.94 as computed under the rule provided by the statute of Missouri, hereinafter set out; and three-fourths of this amount taken as a net single premium for temporary insurance continued said policy in force to a date six years and forty-six days from and after the 11th day of May, 1891, and the policy, if subject to extended insurance as provided for by the statute, was in force at the date of Mr. Cravens' death. (Rec. 5, 16.)

By its answer plaintiff in error alleged that the policy in suit was issued in New York; that the premiums were payable there unless paid to persons designated by the company to receive them elsewhere; and that the insurance was payable at plaintiff in error's office in that State; that the policy provided that it should be controlled by the laws of New York; and that consequently the policy was subject only to the laws of New York and not within the purview of the Missouri Statute. The answer also alleged that the policy contained a different provision as to the application of past

premiums in case of lapse from that made by the Missouri, Statute and that in answer to one of the questions in the application for said policy the provisions of the Missouri Statute were agreed to be waived. The answer offers to pay defendant in error $2,670.00. The answer then sets up the unconstitutionality of the statute. (Rec. 6, 10.)

The opinion delivered by the Supreme Court of Missouri appears in the printed record, pages 49-64, and is based upon the grounds that the policy in suit was subject to the provisions of its Missouri Statute and that the waiver of the Missouri Statute and the agreement providing for the New York law as the applicatory law, were void because contrary to the terms of the Missouri Statute, and that the State of Missouri in enacting the statute acted within constitutional limitations.

THE MISSOURI STATUTE.

The several sections of the Revised Statutes of 1879, in force at date of this policy, relating to non-forfeiture of life insurance policies, are here inserted in full:

"Section 5983. Policies non-forfeitable, when. —No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this State, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the non-payment of premiums thereon, but it shall be subject to the following

rules of commutation, to-wit: The net value of the policy when the premium becomes due and is not paid shall be computed upon the American experience table of mortality, with four and one-half per cent interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be cancelled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but if the policy shall be an endowment, payable at a certain time, or at death if it should occur previously, then if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium, for a pure endowment of so much as such premium will purchase determined by the age of the insured at date of defaulting the payment of premium on the original policy, and the table of mortality and interest as aforesaid, which amount shall be paid at end of the original term of endowment, if the insured shall then be alive.

"Sec. 5984. A paid-up policy may be demanded, when—At any time after the payment of

two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of the policy may demand of the company, and the company shall issue its paid-up policy, which in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the American experience table of mortality, with interest at the rate of four and a half per cent per annum, without deduction of indebtedness on account of said policy, will purchase, applied as a single premium upon the table rates of the company, and in case of a limited payment life policy, or of a continued payment endowment policy payable at a certain time, or of a limited payment endowment policy payable at a certain time, or at death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such premiums stipulated to be paid: Provided, that from such amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy; and provided further, that the policy holder shall, at the time of making demand for such paid-up policy, surrender the original policy, legally discharged, at the parent office of the company.

"Sec. 5985. Rule of payment on commuted policy. If the death of the insured occur within the term of temporary insurance covered by the value

of the policy as determined in section 5983, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in payment of premiums, anything in the policy to the contrary notwithstanding: Provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy, within ninety days after the decease of the insured; and provided, also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid.

"Sec. 5986. The foregoing provisions not applicable, when: The three preceding sections shall not be applicable in the following cases, to-wit: If the policy shall contain a provision for an unconditional cash surrender, value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance, for which the net value shall be equal to that provided for in section 5984, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept

from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this act shall not be applicable."

BRIEF.

The Contract is a Missouri Contract.

Plaintiff in error is a foreign corporation organized under the laws of New York and before and during the period covering this controversy, with the permission of the State of Missouri, maintained offices and agents and did a general life insurance business in Missouri. (Rec. 14.) A citizen and resident of Missouri submitted to the local agent of plaintiff in error in Missouri a written application for insurance upon his life containing the following clause (Rec. 14, 15, 25):

"That under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premiums by the company or its authorized agent during the lifetime and good health of the person on whose life insurance is applied for."

This application was by plaintiff in error's agent transmitted to New York to the company, who there issued the policy in suit, with the clause above cited incorporated in it, transmitted same to Missouri to its said agent who afterwards delivered said policy to the insured in Missouri, and accepted from the insured the first premium in Missouri. (Rec. 15.)

Until, therefore, the health of the applicant was ascertained to be good and the premium was paid and the policy was delivered, all of which could only, and actually did, take place in Missouri, the matter stood thus: The application was an offer

to take the policy in suit upon the conditions specified; the company on issuing the policy made its offer to enter into the contract applied for, provided the applicant could discharge the above conditions at the time the policy should be presented to him by the company's agent in Missouri, and by placing its policy in the hands of its local agent, the company clothed said agent with authority to complete the contract. At the moment of delivery of the policy in Missouri to the applicant in good health and the payment of the premium to the local agent in Missouri, there arose the *consensus ad idem* and the two offers ripened into a binding contract of insurance in the state of Missouri.

To reinforce this conclusion, suppose that the applicant had died after the issuance of the policy and while it was in the hands of defendant's local agent, but before the premium had been accepted and the policy had been delivered. Or suppose when the local agent went to deliver it he had found Mr. Cravens ill. In either of these cases would an action for specific performance have lain? Certainly not; for the language of the contracting parties provides against the consummation of the contract until the acceptance of the premium by the company from the assured who shall be in good health at the time.

Kohen vs. Mut. Res. Fund Life Ass'n, 28 Fed. Rep., 705;

Messelhorn vs. Mut. Res. Fund Life Ass'n, 30 Fed. Rep., 545.

Noyes vs. Phœnix Life Ins. Co., 1 Mo. App. 584.

The utmost therefore that can be predicated of the application and the policy before the delivery of the policy, is that there was outstanding on the part of the insured an offer to purchase insurance of a definite amount of plaintiff in error and on the part of plaintiff in error a delegation of authority to its local agent, evidenced by the policy's being placed in his hands for delivery; to close on its behalf a contract of prescribed terms (the terms of the policy), with the applicant upon receiving from the applicant the first premium called for under the policy. The plaintiff in error and the applicant therefore met and made the contract in Missouri.

Giddings vs. Ins. Co., 102 U. S. 108.

In *Hicks vs. National Life Ins. Co.*, 60 Fed. Rep. 690, 692, decided by United States Circuit Court of Appeals, Wallace, Circuit J., says:

"If any authority were needed for the proposition that a policy applied for in New York, delivered there, and the premiums paid there, is a New York contract notwithstanding it is signed and issued by the insurer in another state, the reference is supplied by the case of *Assur. Soc. vs. Clements*, 140 U. S. 226. The delivery of the policies in the present case was made in New York city to an agent of the assured and in legal effect was as if the assured had been personally present and received them. Then and not before the policies took effect."

In *Northwestern Mut. Life Ins. Co. vs. Elliott et al.*, 5 Fed Rep. 225. An application for a

policy was made at Portland, Oregon, to the company's agent, who forwarded same to the company at Milwaukee, Wisconsin. The company thereupon, in Wisconsin, issued its policy, containing a clause, viz:

"This policy shall not take effect and become binding on the company until the premiums shall be actually paid during the lifetime of the person whose life is assured, to the company or some person authorized to receive it, who shall countersign the policy on receipt of the premium," and transmitted same to its agent at Portland, Oregon, who there delivered it to the insured.

Deady, J., says: "Where, then, was this contract made; in Wisconsin or Oregon? The answer to this question involves the inquiry, where did the final act take place which made this transaction a contract binding on the parties?

"The premium was paid to the agent of the plaintiff at Portland, who then and there countersigned and delivered the policy. This was the consummation and completion of the contract. But, to put this beyond a doubt, the policy itself declares that it shall not be binding on the company until these acts are performed. And until it was binding on the company it was not binding on the applicant; in short, it was not yet a contract, but only a proposition."

Pomeroy v. Manhattan Life Ins. Co., 40 Ills. 400.

Thwing v. Great Western Ins. Co., 111 Mass. 109.

Wood F. Ins., 189, note 2.
Hardie v. St. Louis Mut. Ins. Life Co., 26 La. Ann. 242.
St. Louis Mut. Life Ins. Co. v. Kennedy, 6 Bush 450.

In *Fletcher v. New York Life Ins. Co.*, 13 Fed. Rep. 526, where the policy was delivered in Missouri, to a citizen of Missouri, and the first premium there paid, the court held the contract was controlled by the Missouri law, and through Treat, J., says:

"The defendant company was doing business in Missouri, with the privileges granted to it here, when said insurance was effected. It may be that the formal acceptance of the proposed contract was, by the letter of the contract, to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the state on prescribed conditions. If, despite such conditions, they can, by the insertion of clauses in their policies, withdraw themselves from the limitations of the Missouri statutes, while obtaining all the advantages of its license, then a foreign corporation can, by special contract, upset the statutes of the state and become exempt from the requirements of law: Such a proposition is not to be countenanced. If the defendant corporation chose to embark in business within this state, under the terms and conditions named in the statute, it could not by paper contrivances, however specious, withdraw itself

from the operation of the laws by force of which it could alone do business within the state. To hold otherwise would be subversive of the right of the state to decide on what terms by comity a foreign corporation should be permitted to do business or be recognized therefor within the state jurisdiction. Each state can decide for itself whether a foreign corporation shall be recognized and on what terms. Primarily a corporation has no existence beyond the territorial limits of the state creating it, and when it does undertake business beyond, it does so only by comity. The defendant corporation having been permitted to do business in Missouri, under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses in its forms of application, etc., withdraw itself from the obligatory force of the statute. The contract of insurance is, therefore, a Missouri contract, and subject to the local law." This opinion was concurred in by C. J. McCrary.

This case was taken to the supreme court of the United States and is reported in 117 U. S. 519. The case was there decided upon objections to instructions and reversed, but in the statement of facts Mr. Justice Field says:

"The company is a corporation under the laws of New York, but it also transacts business in Missouri, through agents residing there, and, of course, with reference to the business done in that state, is subject to its laws."

In the case of *Wall vs. Equitable Life Assur.*

Soc., 32 Fed. Reporter 273, a case directly in point, Brewer, J., says:

"The defendant is a New York corporation doing business in the state of Missouri; the insured was a citizen and resident of Missouri, and made his application here, which was forwarded to New York; the application was accepted, the policy fully prepared and signed in that state and sent to Missouri, and delivered to the applicant here. By the terms of the policy all premiums are payable at the defendant's office in New York. If the sum insured should become payable the payment is to be made at its office in New York. * * * * Under these facts, I have little doubt as to the true answer to be made to this first question, viz: 'Is the contract sued on governed and to be construed by the laws of the state of New York, or by the laws of the State of Missouri? In *White v. Insurance Company*, 4 Dill 177, it is held that the act of the legislature of the state of Missouri, March 23rd, 1874, in respect to policies of life insurance extends to all policies of life insurance delivered in this state after the act went into effect.' That was a suit against a foreign insurance company doing business in the state. In *Fletcher v. Ins. Co.*, 13 Fed. Rep. 526, it was held that a foreign insurance company can not withdraw itself from the operation of the statutes of a state in which it does business by insertion of clauses in its policies." That was a case in which the defendant company insisted that by virtue of certain clauses in the application the contract was to be finally and fully executed

in New York. In his opinion, an opinion concurred in by Circuit Judge McCrary, Judge Treat used this language:

"The defendant corporation having been permitted to do business in Missouri, under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses of its forms of application, withdraw itself from the obligatory force of the statute. The contract of insurance is, therefore, a Missouri contract and subject to the local law."

"In view of these authorities and considering the reasoning of Judge Treat in the opinion above referred to, I deem it unnecessary to discuss the question further, and simply hold that the Missouri statues controls."

This case was appealed to the Supreme Court of the United States and affirmed in 140 U. S. 226.

Mr. Justice Gray says:

"Upon the question whether the question sued on was made in New York or in Missouri, there is nothing in the record except the policy and application, the petition and answer, by which the facts appear to have been as follows:

"The assured was a resident of Missouri, and the application for the policy was signed in Missouri. The policy executed at the defendant's office in New York provides that 'the contract between the parties hereto is completely set forth in this policy and the application therefor taken together.' The application declares that the contract shall not take effect until the first premium shall

have been actually paid during the life of the person herein proposed for insurance." The petition alleges that that premium and two annual premiums were paid in Missouri. The answer expressly admits the payment of the three premiums and, by not controverting that they were paid in Missouri, admits that fact also, if material. The petition further alleges that the policy was delivered in Missouri; and the answer, that the policy was, "at the request of the said Wall, transmitted to the state of Missouri and delivered to said Wall in said state." If this form of admission does not imply that the policy was, at the request of Wall, transmitted to another person, perhaps the company's agent, in Missouri, and by him there delivered to Wall, it is quite consistent with such a state of facts; and there is no evidence whatever, or even averment, that the policy was transmitted by mail directly to Wall, or that the company signified to Wall its acceptance of his application in any other way than by the delivery of the policy to him in Missouri. Upon this record the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri."

In *Equitable Life Assur. Soc. vs. Winnig*, decided by the United States Circuit Court of Appeals, October 16th, 1893, and reported in 58 Fed. Rep. 541, the Court, speaking through Thayer,

Judge, says: "As the assured was a resident of Saline county, in the state of Missouri, at the time he became assured, and the policy was delivered in that state, and the first premium was there paid, the contract evidenced by the policy is a Missouri contract, and is governed by the laws of that state within the rule announced in *Society vs. Clements*, 140 U. S. 226."

Stronger or more direct language to this effect cannot be found than that of Caldwell, Judge, in *Berry vs. Knights Templars' and Masons' Life Indemnity Company*, 46 Fed. Rep. at 440, viz: "It is said the policy is an Illinois contract, and to be construed by the laws of that state, but clearly this is not so. The company established an agency and carried on its business in this state. It was through that agency the assured, who was a citizen and resident of the state, made his application and received his policy. The fact that the policy was signed by the officers of the company in Chicago has no significance. It was transmitted to the company's agent in Missouri, who received the premium, called in this case an 'entrance fee,' and delivered the policy to the assured, at his home in this state, and it took effect at that place and from that date."

Not only is the policy in suit a Missouri contract, under the doctrine laid down in the foregoing distinguished Federal authorities, but the question involved has been passed upon by our own state court in the case of *Price vs. Connecticut Mut. Life Ins. Co.*, where the facts were identical with

those of the case at bar, and where the court, after considering the Wall case, adopted the views there expressed and held the contract to be a Missouri contract. 48 Mo. App. 281.

Mut. Benefit Ins. Co. vs. Robinson, 54 Fed. Rep. 580.

Paine vs. Ins. Co., 51 Fed. Rep. 689.

Winfield vs. Ins. Co., 53 Fed. Rep. 208.

Daggs vs. Ins. Co., 136 Mo. 392.

Orient Ins. Co. vs. Daggs, 172 U. S. 557.

Knights Templar, Etc. Co. vs. Berry, 50 Fed. Rep. 511.

Non-forfeiture law part of the contract.

The policy in suit was delivered in Missouri after the passage of the Missouri Non-Forfeiture Law, sections 5983, 5984, 5985 and 5986, Revised Statutes of Missouri, 1879, and these statutes are to be treated as incorporated in the policy.

In *White vs. Ins. Co.*, 4 Dill., at 182, where the question here involved was under consideration, Judge Dillon uses the following language: "We are of the opinion that policies issued and delivered in Missouri, after that act (referring to section 5849 Rev. Stat. of Mo. 1889) took effect, fall within its protective operation; and as to such policies, the act is to be treated as if incorporated therein."

And in *Hicks vs. National Life Ins. Co.*, 60 Fed. Rep. at 692, the circuit court of appeals says: "The policies being New York contracts, were of course dominated by the statute respecting forfeitures as completely as though the statutory conditions had been expressly incorporated in them."

And in *Havens vs. Germania Fire Ins. Co.*, 123 Mo. 403, where the question at issue involved a construction of Sec. 6009, Rev. Stats. 1879 of Mo., which provided that "any policy shall be written on real property, and the property shall be wholly destroyed, the amount of the insurance shall be taken conclusively to be the value of the property when insured, and the amount of loss and measure of damages when destroyed," the court held that this statute became a part of the policy, and that the stipulation in the policy must yield to the statute. The court says: "It is now the established rule that if the facts bring the case within the regulations prescribed by law, the statute enters into and forms a part of the contract of insurance as completely as if written into it." (Citing 4 Dill, *supra.*)

Bank vs. Hume, 128 U. S. 195, 207;

Christian vs. Conn. Mut. Life Ins. Co., 143 Mo. 460;

Daggs vs. Ins. Co., 136 Mo. 382;

Reid vs. Painter, 129 Mo. 680;

Reilly vs. Ins. Co., 43 Wis. 449;

Ins. Co. vs. Leslie, 47 Ohio St. 409;

Carter vs. Brooklyn Life Ins. Co., 110 N.Y. 15;

Phelan vs. Northwestern Life Ins. Co., 113 N. Y. 147;

Baxter vs. Brooklyn Life Ins. Co., 119 N. Y. 450;

McDougall vs. Prov. Sav. Life Ins. Co., 135 N. Y. 551.

Statute cannot be upset by direct waiver.

The direct waiver is contained in the policy in the following language (Rec. 18): "And all right, claim or interest arising under statute or otherwise to or in any other paid-up policy or surrender value and to or in any benefit or insurance whether required or provided by the statute of any State or not, is hereby expressly waived and relinquished."

(1) That this clause is without legal effect was settled by the case commonly known as the Wall case, reported in 32 Fed. Rep. 273, and on appeal in 140 U. S. 226, where, at page 233, the court, referring to the above statute, says: "The manifest object of the statute, as of many statutes regulating the form of policies of insurance on lives or against fires is to prevent insurance companies from inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company with the consent of the assured; but it is mandatory and controls the nature and terms of the contract into which the company may induce the assured to enter. This clearly appears from the unequivocal words of com mand and of prohibition above quoted, by which, in Section 5983, 'no policy of insurance,' issued by any life insurance company, authorized to do business in this state, 'shall, after the payment of two full annual premiums, be forfeited or become void by reason of the non-payment of premium thereon, but it shall be subject to the following rules of commutation,' and in section 5985, that if the assured

dies within the term of temporary insurance, as determined in the former section, 'the company shall be bound to pay the amount of the policy,' 'anything in the policy to the contrary notwithstanding.' This construction is put beyond doubt by Section 5986, which, by specifying four cases (two of which relate to the form of the policy), in which the three preceding sections shall not be applicable, necessarily implies that those sections shall control all cases not so specified, whatever be the form of the policy."

"It follows that the insertion in the policy of a provision for a different rule of commutation from that prescribed by the statute, in case of default of payment of premium after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by the statute of any state or not,' is an ineffectual attempt to evade and nullify the clear words of the statute."

These views were adopted by the Missouri court of appeals in *Price v. Connecticut Mut. Life Ins. Co.*, 48 M. A. at 294, where the court says that, "where an insurance company does business in this state, and issues its policies to residents of this state, the validity of the clauses in its policies must be determined by the laws of this state. The laws of this state establish a rule of public policy which overrides the freedom of contract of the parties, and makes waivers of statutory provisions

ineffectual, although such waivers are contained in the strongest terms in the policies."

Statute cannot be upset by indirection.

The attempt to accomplish a waiver by withdrawing the policy from the protection and control of the laws of Missouri by providing that the policy should become a New York contract and should be governed by the laws of New York is to be found in the following language of the application made a part of the policy. (Rec. 25, §6.)

"That the entire contract contained in the said policy and in this application shall be construed and interpreted as a whole and in each of its parts and obligations according to the laws of the State of New York, the place of the contract being expressly agreed to be the principal office of said company in the City of New York," etc.

Resting as they do upon public policy these statutes cannot be abrogated by the device of indirection—

New York Life Ins. Co. v. Russell, 77 Fed. Rep. 94.

National Union v. Marlow, 74 Fed. Rep. 775.

Price v. Conn. Mut. Life Ins. Co., 48 Mo. App. 226.

Wall v. Equitable Life Assur. Soc., 32 Fed. Rep. 273.

Same case on appeal, 140 U. S. 226.

In the case of *Price v. Conn. Mut. Life Ins. Co.*, *supra*, the St. Louis Court of Appeals passed

upon the point, the agreement being viz: "It is agreed that the policy hereby applied for shall if granted, be held to be issued and delivered at Hartford, in the state of Connecticut, and it shall in all respects be construed and determined in accordance with the laws in that state." In addition was a clause directly waiving the Missouri non-forfeiture law. The court held the contract to be a Missouri contract observing that "the laws of the state establish a rule of public policy which overrides the freedom of contract of the parties and makes waivers of statutory provisions ineffectual although such provisions are contained in the strongest terms in the policies."

In *Mutual Benefit Life Ins. Co. v. Robinson*, where one of the questions involved was whether a contract of life insurance, delivered in the state of Iowa, to a resident of Iowa, should be governed by the Iowa statute or by the law of New Jersey, the contract itself providing that the law of New Jersey should govern, the court, after elaborately discussing the cases in point, held that the Iowa statute governed. And in *Berry v. Knights Templars' and Masons' Life Indemnity Co.*, 46 Fed. Rep. at 441, Caldwell, J., says (in deciding a case in which the policy waived and modified the suicide section of our statue): "Doing business in the state brings the policy within the operation of its laws, notwithstanding the policy may be signed and the loss made payable in another state. In such cases the company cannot, by any contrivance or device whatever, evade the effect and operation of

the laws of the state where it is doing business." * * * * "The statute is mandatory and obligatory alike on the insurance company and the assured. Its very object was to prohibit and annul such stipulations in policies and it cannot be waived or abrogated by any form of contract or by any device whatever. The legislative will, when expressed in the peremptory terms of this statute, is paramount and absolute and cannot be varied or waived by the private conventions of the parties." This language is approved in *Kellar v. Trav. Ins. Co.*, 58 Mo. App. 561.

The effect of the stipulation contained in the policy in suit, "that the policy shall be a New York contract," is to waive the laws of Missouri, section 5983 and 5984, which enter into and control every policy "issued by any life insurance company authorized to do business in the state," "anything in the policy to the contrary notwithstanding."

The agreed statement of facts, section 13, (Rec. 15) declares there is no absolute non-forfeiture law in the state of New York, and the insertion of this clause in the policy was to take from the assured the benefit of Missouri's law, by placing the contract under the force of the statute of a state where no such statute prevailed. This is, therefore, a device to evade and nullify our statute by indirection, a statute whose very object was to control every policy of life insurance entered into in Missouri, and which the courts have unanimously held to be mandatory and not subject to waiver.

Speaking of the scope, intention and effect of

The freedom of contract is involved equally in each case, and in each case must be denied; the court in the Price case recognizing that it was going beyond the Wall case in a matter of form, in refusing to give effect to the agreement that the policy should be held to be a Connecticut contract and observing that the difference between the two cases is not sufficient to distinguish them. It must be remembered that defendant is a foreign corporation doing business in Missouri, not by right, as would a natural person, but solely on account of legislative permission, and has authority to make only such contracts as the legislation of the State Missouri has given it authority to make. Missouri has passed mandatory statutes to control the nature and terms of defendant's contracts entered into here. The highest authority has held that these statutes are not made purely for the benefit of a private person unmixed with consideration of public policy and that they may not be set aside by direct waiver. To sustain defendant's argument that this may be accompained by an agreement entered into by the assured and defendant, "that the contract shall be a New York contract," is to permit defendant to accomplish the upsetting of these statutes by an adroit use of language, and would necessitate the overruling of both the Wall and Price cases, *supra.*

New York Life Ins. Co.v. Russell, 77 Fed. Rep. 94.

National Union v. Marlow, 74 Fed. Rep. 775.

Equitable Soc. v. Clements, 140 U. S. 226.

Bona fides of contracting parties immaterial.

Can the New York law be held to be the applicatory law on the ground that the policy provision making it the applicatory law is a *bona fide* attempt to provide the applicatory law?

The question has a double aspect and the answer depends, as suggested by the preceding cases, upon the public policy of the state where the question arises.

When the policy of the state in which a foreign corporation is doing business does not forbid, such corporation may make the law of the state of its creation the applicatory law.

Equitable Life Assur. Soc. vs. Nixon, 81 Fed. Rep. 796.

Penn. Mut. Life Ins. Co. vs. Mechanics Sav. Bank, 72 Fed. Rep. 413.

Mut. Life Ins. Co. vs. Hill, 97 Fed. Rep. 263.

The first of this group of cases was an action upon a policy of life insurance. The application was made in Washington and at the time of making the application the advance premium was paid to the company's agent in Washington, who was to forward it to the company in New York. The application provided that the insurance should not take effect unless the risk was approved and the premium accepted by the company in New York. By the terms of the policy all premiums and the loss under the policy were payable in New York, and proof of death was to be made in New York.

The company resisted payment on the ground that the contract provided for its own forfeiture for the non-payment of premium, and that the premiums had not been paid. There was no statute in the state of Washington affecting the right of the parties to provide for forfeiture.

The contract was held to be a New York contract and non forfeitable on account of the New York statute.

At page 798 the court, considering the first contention, says: "It would seem to be very clear therefore that the rights and obligations of the respective parties are to be measured and controlled by the laws of that state (New York), subject perhaps to any additional limitations or conditions imposed by the statute of the state, then territory (Washington) into which the defendant corporation went to solicit business in question; for it may be true that every corporation that enters a state other than that of its creation and there transacts business does so in subordination to the statutes of the state permitting its entry therein, and that no business transacted by virtue of the privilege thus conferred can by any sort of contract be removed from the operation of the statute of the state permitting the business to be transacted, but in the present case, as has been said, there is in Washington no statute affecting that portion of the policy here in question."

"The conclusion reached by the court below—which we think correct—that the contract in ques-

tion was a New York contract, is well supported by authority."

Wayman vs. Southard, 10 Wheaton 48.
Pritchard vs. Norton, 106 U. S. 124, 134, 141.
Bank vs. Hume, 128 U. S. 195, 206.
Coghlan vs. Railroad, 142 U. S. 116, 120.

"There is nothing to the contrary in the case of *Society vs. Clements*, 140 U. S., so much relied on by the plaintiff in error. In that case it appeared that the first premium was not paid by the assured until the delivery of the policy to him in the state of Missouri, and no other acceptance of his application for insurance by the company was made to appear. The contract involved in the present case was made when the application and the applicant's money were accepted by the insurance company—not before or after. It then became a completed contract, binding both parties to it. The place of its making, as well as the place of its performance, being the state of New York, there is no room to doubt that it is governed by the laws of that state."

Phinney vs. Mut. Life Ins. Co. 67 Fed. Rep. 493, is identical with the case last considered, and was determined in the same judicial circuit.

In *Penn. Mut. Life Ins. Co. vs. Mechanics Savings Bank and Trust Co.*, 72 Fed. Rep. 413, the foreign law stipulation in the policy provided "that the place of the contract shall be the city of Philadelphia, State of Pennsylvania."

The court gave effect to this stipulation and construed the policy according to the law of Pennsylvania.

The facts in this case do not show whether the policy in suit became a contract in Tennessee or in Pennsylvania, or whether there was in Tennessee a declaration of public policy such as is found in the Missouri statute limiting the contractual powers of insurance companies, while doing business in Tennessee, in the matter of providing for forfeitures. The consideration of the case is had without reference to any statute, and therefore the case is correctly decided and in nowise extends the doctrine laid down in *Wayman vs. Southard, supra.*

Where the policy of the state in which a foreign insurance corporation is doing business subjects the contracts of such corporation to the control of a statute, such corporation cannot withdraw its contracts then made from the control of such statute by providing in such contracts that such contracts shall be controlled by the laws of a different state. This rule finds illustration in the following group of cases:

New York Life Ins. Co. vs. Russell, 77 Fed. Rep., 94;

Price vs. Conn. Mut. Life Ins. Co., 48 Mo. App., 226;

National Union vs. Marlow, 74 Fed. Rep., 775;

Wall vs. Equitable Life Assur. Soc., 32 Fed. Rep. 273;

Same Case on Appeal, 140 U. S., 226.

In the first of these cases the application was made and the policy delivered in Nebraska to a citizen of Nebraska. The application and policy warranted that all statements and representations contained in the applications and all declarations made to the medical examiner were complete and true, and the contract further provided that no statements nor information made to the person taking the application should bind the company or in any manner affect its rights unless such statements and information were reduced to writing and presented to the officers of the company at its home office. To a certain question asked in the application the insured gave to the medical examiner of the company an oral answer which stated correctly the fact enquired about; the medical examiner, however, determined after personal examination of applicant that the answer given was not correct, and thereupon wrote into the application a different, and, as it afterwards turned out, an incorrect answer. The original answer of applicant was not reduced to writing nor made known to the officers of the company.

For the reason that the answer placed in the application by the company's medical examiner was in fact untrue and the answer as made by the applicant was not made known to the company, the company claimed that it had not received the information that its contract required that it should receive; that the knowledge of such facts by its local representative was not knowledge to the company and that therefore there could be no re-

covery upon the contract. The plaintiff contended that imparting the information to the representative of the company was under the statute of Nebraska imparting it to the company, and that the local agent's acts bound the company.

To this contention the company replied that its policy provided that it should be construed according to the laws of New York, the place of the contract being agreed to be the home office of the company.

The Court declined to give effect to the foreign law stipulation, and laid down the rule that to withdraw the policy from the control of the Nebraska statute was not within the contractual power of the parties.

In *Equitable Life Assur. Soc. vs. Nixon*, *supra*, and *Phinney vs. Mut. Life Ins. Co.*, *supra*, the intention of the parties as gathered from each contract showed that the parties made the contract with reference to the laws of New York. In *Penn. Mut. Life Ins. Co. vs. Mechanics Sav. Bank & Trust Co.*, *supra*, the parties left nothing to be supplied by intent, but made an express provision for the law of Pennsylvania as the applicatory law. These three cases are consequently identical in principle.

Each of these cases is correctly decided, for in the States of Washington and Tennessee these foreign corporations had been admitted subject to no conditions and clothed with every contractual power conferred upon them by their respective charters.

There is, however, a sound and very marked distinction between the foregoing and the following cases:

New York Life Ins. Co. vs. Russell, 77 Fed. Rep. 94.

Price vs. Conn. Mut. Life Ins. Co., 48 Mo. App. 226.

Equitable Life Assur. Co. vs. Clements, 140 U. S. 226.

National Union vs. Marlow, 74 Fed. Rep. 775.

In the latter cases the contracts became binding contracts in jurisdictions which possessed positive statutes, resting upon public policy, limiting, as a condition of the corporation's admission into the State, the contractual powers which the corporation might there exercise. Because of the limitation thus imposed the Russell and Price cases, *supra*, declined to give effect to the foreign law stipulation. And it is submitted that these cases do not extend the doctrine of *Equitable Assur. Soc. vs. Clements* 140 U. S. 226. In these cases there was no express stipulation for the application of the foreign law, but the intention of the parties to apply the New York law to the contract is manifested in the same way, and is as clear as it is in either the Nixon or Phinney cases, *supra*. The intention of the parties cannot furnish the rule because the parties to the contract are subject to the disability of the statute—plaintiff in error having assented thereto when it entered the State to do business therein.

The statute became a part of the contract at bar, and controls its nature, obligation and interpretation.

Liverpool Steam Co. vs. Phœnix Ins. Co., 129 U. S. 397.

Does the judgment of the Supreme Court of Missouri in construing the statute in controversy as denying to plaintiff in error the contractual power to withdraw its contract, entered into in Missouri with a citizen of Missouri, from the control of the Missouri statute, violate any privilege or immunity guaranteed to plaintiff in error by the Fourteenth Amendment of the Constitution of the United States?

"A corporation is not a citizen within the meaning of the provision and hence has not "privileges and immunities" secured to citizens against state legislation."

Orient Ins. Co. vs. Daggs, 172 U. S. 557;
Paul vs. Virginia, 8 Wall 168;
Bank of Augusta vs. Earle, 13 Pet 586;
Pembina Mining Co. vs. Pennsylvania, 125 U. S. 181.

Consequently the right of a state to prescribe conditions upon which foreign corporations, not agencies of the general government and not engaged in inter-state commerce, may be admitted to transact business within its borders has been frequently asserted and uniformly sustained.

Hooper vs. California, 155 U. S. 648, and cases cited.

The State of Missouri by the statute in controversy, a general statute applicable to all life insurance companies authorized to do business in the state, has simply restricted the exercise of the corporate powers of plaintiff in error, in the matter of the forfeiture of policies written within her boundaries as a condition of admission and the transaction of business. Such is the construction of this statute by the Supreme Court of Missouri. (Rec. 58.)

The reasoning that would enable plaintiff in error to withdraw its contracts here entered into from the control of the statute by making the law of New York, Maine or California the applicatory law would also give it authority to abrogate the statute by inserting into its contracts a clause of direct waiver. As suggested, *supra*, both of these devices are resorted to in the policy in suit. The legislature of New York could then create a corporate entity with contractual powers contravening the declared public policy of the State of Missouri and denied by Missouri to her own corporate creations and by virtue of the creative statute of New York this corporation would enter the State of Missouri, and here make its objectionable contracts by placing them under the control of the New York law. Missouri is thus forced to give extra territorial effects to the laws of New York. If she does not, then, says plaintiff in error, she abridges the privileges and immunities guaranteed to plaintiff in error by the Fourteenth Amendment. In view of the decisions, *supra*, this contention would seem to be anomalous.

That plaintiff in error is a mutual insurance corporation having no capital can be of no legal consequence. It is a corporation and as such is subject to the provisions of the statute.

The validity of the statute is denied under the Fourteenth Amendment on the ground that the statute destroys mutual life insurance, that the plan of insurance embodied in the contract in controversy is a well known type of insurance in which all parties insured in the same year constitute the same tontine class with the insured and thus each acquires a contingent intest in the event of survivorship in the other policies of the class—that to effectuate this plan the corporation issuing the policies embodying this plan should control all such policies by the same rule and that the statute in preventing the corporation from subjecting its policies scattered throughout the various States of the United States and foreign countries to one uniform rule violates the rights of plaintiff in error.

In making this contention plaintiff in error proceeds upon an assumption unwarranted by the history of life insurance companies writing tontine policies in Missouri since the passage of the statute and over-looks the fact that this plan of insurance is not peculiar to purely mutual companies doing life insurance business but is in use by all life insurance companies (Rec. 16), that the objector to the validity of the statute is a corporation doing business within the state that enacted the statute solely by virtue of that state's permission, and finally that the Fourteenth Amendment does not profess to

secure to all persons in the United States the benefit of the same laws and the same remedies.

In *Missouri v. Lewis*, 101 U. S. at page 31, the court, speaking through Mr. Justice Bradley, said: "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury and on the other side no such right. Each state prescribes its own mode of judicial proceedings."

Guthrie on Fourteenth Amendment, 70, 72.

The next particular in which the statute is alleged to violate the Fourteenth Amendment is that the statute makes a new contract for the parties different from the contract made between them.

This contention is fully answered and the validity of the statute asserted in case of *Orient Ins. Co. v. Daggs*, 172 U. S. 557. When this court reads the non-forfeiture statute into the policy in suit and reads the valued policy statute into the Daggs fire insurance policy it acts are in no wise different. Obviously the state's power of control extends to both.

The statute is not a regulation of commerce.

The business of life insurance is not commerce between the states and hence cannot be carried on in a state by a foreign corporation without comply-

our statute, Brewer, J., in the Wall case, 32 Fed. Rep. at pp. 276 and 277, says: "In the first place a technical argument can be made on the language of the statute. It says the value of the policy *shall* be determined in a certain way, and then that if the death of the insured occur during the term of temporary insurance covered by the value of the policy thus determined, the company *shall* be bound to pay the amount of the policy, 'anything in the policy to the contrary notwithstanding.' This language is broad enough to include a waiver, and may be construed as meaning that no stipulation, no waiver, no agreement for a different forfeiture—in fact, nothing that a party can put into a policy—shall defeat the right to recover the full amount if death occurs during this time of temporary insurance. Of course, this is a purely technical construction of the statute, and I am disposed to rest my conclusion more upon the matter of public policy. And here the history of insurance must be taken into consideration. It is notorious that many insurance companies were vigorous in insisting upon forfeitures, sometimes under very inequitable circumstances, and there was no little public clamor by reason thereof. Such clamor prompted many legislatures to interfere, and to seek by legislation to protect what they supposed the rights of the insured. Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases—absolute and universal, because if it applied only in cases in

which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive—in fact, no words of negation in any direction—yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce. *Railway Co. v. Peavey*, 29 Kan. 169. The legislature has by this language declared a rule in respect to forfeitures in life insurance policies; it has thus established the policy which it believes should obtain in this state and, though sitting on the federal bench, it is my duty to administer the laws of this state in the spirit in which they were enacted, and to uphold both their letter and spirit. It is voluntary with any foreign insurance company whether it shall come into this state to transact business; coming in, it should be willing to comply with all the statutes as to all business arising within this state, and no court, least of all a federal court, should hasten to release it from this obligation."

The freedom of defendant—a foreign corporation to make in Missouri a different contract from that contemplated and provided for by the Missouri statute—is by that statute prohibited. This prohibition if valid and effectual against a direct waiver, as was held in both the Wall and Price cases, certainly can not lose any of its effect when applied to a contract which seeks to accomplish by indirection that which the statute forbids to be done.

ment plan; whether they will have it for a large or a small amount; whether they will have the insurance payable upon maturity in a gross sum or distributed in instalments over a series of years; whether the premiums shall be paid annually, semi-annually or quarterly; who shall be the beneficiaries in the policy—all these are matters in which the statute permits absolute freedom.

After all these matters have been determined by the parties and the premiums for two full years have been paid, the statute then applies to the policy and prevents a forfeiture until the applicable reserve has been exhausted. The reserve consisting of the excess of the company's income from the policy each year over and above the cost of insurance for that year, the statutory requirement of its use for the benefit of the policy holder is one in the interest of fair, open and honest dealing. The company cannot be deprived of propery to which it is entitled, for the statute takes hold of an accumulated fund which belongs to the policy holder, making the computation of this accummulation upon a table approved of and in use by life insurance companies generally. In *Orient Ins. Co. v. Daggs*, *supra*, the court, in considering the valued policy section of the Missouri statute under the constitutional objection of deprivation of property without due process of law, though Mr. Justice McKenna, said: "We see no risk to insurance companies in this statute. How can it come? Not from fraud and not from change because, as we have seen, the presumptions of the statute do not obtain against

fraud or change in the valuation of the property. Risk then can only come from the failure to observe care—that care which it might be supposed without any prompting from the law, underwriters would observe and which, if observed, would make their policies true contracts of assurance; not seemingly so, but really so, not only when premiums are paying but when losses are to be paid. The state surely has the power to determine that this result is desirable and to accomplish it, even by a limitation of the right of contract claimed by plaintiff in error. It would be idle and trite to say that no right is absolute. *Sic utera tuo ut alieenum non laedas* is of universal and pervading obligation. It is a condition upon which all property is held. Its application to particular conditions must necessarily be within the reasonable discretion of the legislative power. When such discretion is exercised in a given case, by means appropriate and which are reasonable, not oppressive or discriminatory, it is not subject to constitutional objection. The Missouri statute comes within this rule."

The non-forfeiture statute will stand the test thus suggested; it operates alike on all corporations doing business in Missouri, foreign and domestic, writing policies of insurance upon life upon which a reserve has accumulated.

Guthrie on Fourteenth Amend. 70.

Wherefore the judgment of the Supreme Court of Missouri should be affirmed.

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